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No. 09-311

IN THE
Supreme Court of the United States

HCA HEALTH SERVICES OF OKLAHOMA, INC., d/b/a OU MEDICAL CENTER d/b/a CHILDREN'S HOSPITAL, and OU MEDICAL CENTER,

Petitioners,

v.

NATHAN SHINN, a minor, by and through his parents, BRITTANY SHINN and BRANDON SHINN, and BRITTANY SHINN and BRANDON SHINN

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CIVIL APPEALS

BRIEF OF RESPONDENTS IN OPPOSITION

Gerald E. Durbin, II
Katherine T. Loy
Counsel of Record
Glen Mullins
DURBIN, LARIMORE & BIALICK
920 North Harvey
Oklahoma City, OK
(405) 235-9584

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Counsel for Respondents

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under 28 U.S.C. § 1257(a) to review a decision of the Oklahoma Court of Civil Appeals where the federal question on which Petitioners seek review – whether the Due Process Clause required the trial judge to recuse herself – was neither addressed by nor presented to the Court of Civil Appeals.

2. Whether Petitioners' due process rights were violated by entry of a default judgment as a sanction for noncompliance with a discovery order where (i) Petitioners knew that default judgment was a possible sanction for noncompliance, (ii) they received a two-hour hearing before the judge during which they were permitted to make any arguments they wished, and (iii) their subsequent written submissions do not call into question the trial court's finding of noncompliance.

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BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Oklahoma Court of Civil Appeals (Pet. App. 1a-31a) and its opinion on rehearing (*id.* at 32a-63a) are unpublished. The order of the Oklahoma Supreme Court denying the petition for a writ of certiorari (*id.* at 64a-65a) is also unpublished.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2008. A petition for a writ of certiorari was denied by the Oklahoma Supreme Court on May 11, 2009. On July 20, 2009, Justice Breyer extended the time to file a petition for a writ of certiorari to and including September 8, 2009, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). For reasons explained below (*see* Part I.A *infra*), however, the Court lacks jurisdiction over the recusal issue because it was neither addressed by nor properly presented to the state court that rendered the decision on which Petitioners seek review.

STATEMENT

1. On January 13, 2005, Nathan Shinn, a nine-month-old infant, was admitted to Petitioners' hospital. Pet. App. 2a. In the early morning hours of January 14, Nurse Renny Jacob struck Nathan's head against a nightstand while changing the sheets in his crib. *Id.* Ms. Jacob did not seek medical assistance for Nathan and did not report the

incident. *Id.* Later that morning, a different nurse noticed "swelling and 'sponginess' around Nathan's head," but did not order tests or notify a doctor. *Id.* Nathan's injuries went untreated until his father arrived at the hospital and demanded to see a doctor. *Id.* The doctor determined that Nathan had suffered "multiple skull fractures and an intracranial hematoma." *Id.*[1]

The hospital staff contacted the police and the Oklahoma Department of Human Services ("DHS") about Nathan's injuries. The examining physician told police "that the injury was suspicious and indicated non-accidental trauma." *Id.* at 26a.[2] Ms. Jacob, the nurse who caused Nathan's injuries, "lied about the incident to police" and "signed a sworn statement denying responsibility for Nathan's injury." *Id.* at 2a. Based on this information, the police and DHS investigated Nathan's parents, Respondents Brittany and Brandon Shinn, for

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[1] Petitioners incorrectly assert that Nathan's "injuries resolved themselves without medical intervention." Pet. 4. Yet, according to the court of appeals, the record established that Nathan's injuries "ultimately required further medical care." Pet. App. 25a. Petitioners offer no reason why the Court should accept their version of the facts instead of the state courts' findings. *See, e.g., Hernandez v. New York*, 500 U.S. 352, 366 (1991) ("Our cases have indicated that, in the absence of exceptional circumstances, we would defer to state-court factual findings . . . .").

[2] Petitioners assert that Nathan's injury was "accidental" (Pet. 4), but the state courts made no such finding. To the contrary, the court of appeals noted that the physician thought the injury was "non-accidental" and that the police department "had recommended that the district attorney press charges against the nurse responsible for Nathan's injuries." Pet. App. 26a.

suspected child abuse. *Id.* The Shinns remained under investigation for child abuse for 24 days. *Id.* During this time, the police interrogated each parent separately and an officer was "constantly stationed by Nathan's room." *Id.*

On February 2, 2005 – almost three weeks after the incident – the police asked Ms. Jacob to take a lie detector test. *Id.* at 3a. At that point, she "finally admitted to the police that she had caused Nathan's injuries." *Id.* After Ms. Jacob's confession, the hospital staff waited an additional five days before informing the Shinns of the cause of Nathan's injuries. *Id.* Although the hospital staff knew that DHS was investigating the Shinns for child abuse, "the hospital made no attempt to inform DHS of the incident." *Id.* at 26a. Moreover, the hospital should have informed the Oklahoma Board of Nursing of Ms. Jacob's conduct, but "an overwhelming amount of evidence" suggests that Ms. Jacob was not reported to the nursing board. *Id.* at 28a-29a.

2. In July 2005, the Shinns sued Petitioners HCA Health Services of Oklahoma, Inc. and OU Medical Center (collectively "HCA") for negligence and intentional infliction of emotional distress. *Id.* at 3a. They sought compensatory and punitive damages for Nathan's injuries and pain and suffering, and for their own pain and suffering. *Id.* HCA engaged in "egregious and questionable behavior throughout [the] litigation." *Id.* at 13a.

HCA repeatedly refused to comply with its discovery obligations. For example, HCA objected to producing Ms. Jacob's personnel file on the ground

that it was not relevant. *Id.* at 45a. As the court of appeals observed, "[i]t is absolutely confounding and unsupported by any argument offered by HCA to submit that the personnel records of the HCA employee known to have caused the fracture to Nathan Shinn's skull are irrelevant to his parents' suit to recover for those injuries." *Id.* Moreover, "HCA's non-compliance throughout the discovery process was not confined to the production of documents. The same pattern of obstructive non-compliance is evident throughout the record with regard to requests for admissions, interrogatories and even the production of witnesses for depositions." *Id.* at 4a.

The Shinns responded to HCA's noncompliance by filing a motion to compel the production of documents. *Id.* at 4a. On August 25, 2006, the trial court granted the motion and ordered HCA to produce responsive documents (including Ms. Jacob's personnel file) or to provide an affidavit stating that such documents did not exist. *Id.* at 4a-5a, 57a. The court ordered HCA to fulfill these obligations within a week *Id.* at 4a-5a.

HCA "refused to sign the Journal Entry memorializing the Trial Court's order and failed to respond to the discovery requests as ordered by the Trial Court." *Id.* at 5a. Although the trial court ordered HCA to produce documents within a week of August 25 2006, HCA did not make its "first 'material' attempt at responding to the Shinns' discovery requests" until October 27, 2006 – the Friday afternoon three days before trial. *Id.* at 5a, 10a. This production included "735 pages of

documents, an affidavit, and a privilege log." *Id.* at 10a. The production, according to the court of appeals, differed from earlier productions in only one respect: "the last produced documents were harmful to HCA's defense." *Id.* at 47a.

As part of this production, HCA finally provided the personnel files of Ms. Jacob and two other nurses. *Id.* at 28a. "No documents critical of Nurse Jacob were contained in her personnel file." *Id.* at 47a. Instead, "relevant documentation of Nurse Jacob's performance history was placed in the file of another nurse." *Id.* at 28a. These documents, which had been requested over 14 months earlier, were "critical of her ability to care for infants" and noted that she "does not meet expectations" and has "limited ability." *Id.* at 47a. The documents recount an incident – purportedly a "training exercise" – during which Ms. Jacob found "an infant on the floor after hearing a 'thump.'" *Id.* The report "notes that Jacob did not stabilize the infant's spine or notify the RN of the incident; omissions Jacob admits repeating when Nathan was injured." *Id.*

Because the Friday, October 27 production was untimely and "still largely deficient," the Shinns moved for sanctions on Monday, October 30 – the day the trial was set to begin. *Id.* at 5a. The trial court held a hearing "that lasted approximately two hours," during which "HCA was permitted to make every argument it desired." *Id.* at 57a-58a. After the hearing, the trial court entered a default judgment against HCA as a sanction for its violation of the August 25 order. *Id.* at 5a. A trial on damages was then held. *Id.* The jury returned a verdict of $4

million for Brittany and Brandon Shinn and $5 million for Nathan Shinn in compensatory damages, and $9 million in punitive damages. *Id.*

3. On September 21, 2006 – approximately a month after HCA was ordered to produce documents and a month before trial – HCA first requested that Judge Swinton recuse herself. HCA moved to disqualify Judge Swinton because Gerald Durbin, the Shinns' counsel, was a co-chairman of her reelection campaign and had contributed to her campaign. According to the official election records, Mr. Durbin made a net contribution of $280.23 to Judge Swinton's campaign.[3]

Instead of making an informal, *in camera* request for recusal as required by Oklahoma law, *see* 20 Okla. Stat. § 1403; Okla. Dist. Ct. R. 15, HCA moved to disqualify Judge Swinton on the record before a court reporter. Judge Swinton denied the request. She concluded that disqualification was unnecessary because: (i) she had no way of knowing how much anyone contributed to her campaign, Resp. App. 4a-5a; (ii) her husband, and not the formal co-chairmen,

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[3] The official election records show that, on March 10, 2006, Mr. Durbin contributed $1,000 to Judge Swinton's campaign (the maximum contribution is $5,000). The total amount raised by Judge Swinton's campaign was almost $26,000. Because she was unopposed, Judge Swinton spent only around $7,000 and refunded the rest. On August 13, 2006, Mr. Durbin received a refund of $719.77, and therefore his net contribution was $280.23. *See* Campaign Contributions and Expenditures Report, Form C1R (Oct. 27 2006), *available at* https://www.ok.gov/ethics/crs/c1r/view_c1r.php?reg_id=106308&action=public&report_num=41772.

was "the real operation behind" the campaign, *id.* at 5; and (iii) "there is no ongoing campaign," *id.* Judge Swinton was unopposed for reelection, and therefore Oklahoma law provides that she was deemed reelected on June 7, 2006, the deadline for filing a declaration of candidacy. 26 Okla. Stat. § 6-102. ("Any candidate who is unopposed in any election shall be deemed to have been nominated or elected, as the case may be, and his name will not appear on the ballot at any election in which he is so unopposed."). Thus, when HCA moved to disqualify Judge Swinton, there was no longer an ongoing campaign because she had already been reelected.[4]

After Judge Swinton denied HCA's written motion to disqualify, HCA presented the motion to Chief Judge Elliot. 20 Okla. Stat. § 1403; Okla. Dist. Ct. R. 15. Chief Judge Elliott denied the motion for lack of jurisdiction because HCA had not followed the proper procedure for seeking disqualification.

HCA then filed a petition for a writ of mandamus in the Oklahoma Supreme Court. This mandamus petition challenged only Chief Judge Elliot's procedural ruling, and not the merits of the disqualification issue. The Oklahoma Supreme Court ordered Chief Judge Elliot to hold a hearing on the matter. Pet. App. 66a. After considering the

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[4] Because Judge Swinton was deemed to be reelected before HCA moved to disqualify her, the case does not present Petitioners' first question presented: whether recusal is required "in a case in which the chair of her *ongoing* reelection campaign is lead counsel for one of the parties." Pet. i (emphasis added).

evidence, Chief Judge Elliot denied the motion to disqualify.

HCA then filed a second mandamus petition with the Oklahoma Supreme Court. On October 27, 2006, the Supreme Court exercised its original jurisdiction and denied the petition. *Id.* at 68a.

4. HCA did not challenge the denial of the disqualification motion on appeal. Instead, it raised numerous other issues. *Id.* at 1a-63a. The court of appeals affirmed in all respects. *Id.*

Discovery sanctions. On appeal, HCA argued that the trial court abused its discretion in directing a verdict on liability. On rehearing, HCA argued that the sanctions hearing violated due process. The court of appeals rejected both arguments. *Id.* at 7a-12a, 51a-58a.

In reviewing the decision to impose sanctions for discovery violations, the court had no difficulty determining that HCA's conduct warranted such a sanction. As the court of appeals explained:

- "HCA's failure to comply with discovery in any material way until three days prior to trial impeded the Shinns' ability to prepare for trial." *Id.* at 9a.

- "The delay tactics on the part of the defendant have been well established . . . ." *Id.*

- "The uniform pattern of HCA's failure to respond to legitimate requests throughout the discovery process clearly supports the Trial

Court's finding that this conduct unnecessarily obstructed the judicial process." *Id.*

- "HCA willfully and recklessly disregarded the Trial Court's direct orders." *Id.* at 10a.

- "HCA's first 'material' attempt at responding to the Shinns' discovery requests came fourteen months after the initial request for production of documents was served." *Id.*

- "At best, HCA failed to honor the discovery process until three days before trial, which the Trial Court found to be an attempt to force the Shinns to request a continuance." *Id.* at 12a.

The court also determined that HCA had sufficient notice that a default judgment was a possible sanction for noncompliance, noting that "[t]he record before this Court clearly establishes, beyond any doubt, that counsel for HCA was well aware of the possibility of such a sanction." *Id.* at 11a. Moreover, "HCA's underlying liability for the injuries suffered by the Shinns was admitted prior to trial and the essential facts supporting the Trial Court's directed verdict are not in dispute." *Id.*

On rehearing, the court of appeals held that the sanctions hearing complied with due process. *Id.* at 51a-58a. Applying this Court's decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the court of appeals noted that "the timing of the hearing on the Shinn's motion was primarily the result of HCA's untimely discovery responses." *Id.* at 54a. Important to the court's decision was the fact that the additional

procedures requested by HCA would not have changed the outcome of the hearing:

> None of HCA's post-trial or appellate submissions shows that the district court was mistaken with respect to HCA's failure to comply in full with its August 25 order. This fact speaks to whether additional time and a further opportunity to defend the Shinns' motion would have had any probable outcome on the result; the second of the *Mathews* factors. Although the correct result does not guarantee that a party was provided adequate due process, the second *Matthews* factor considers whether additional procedural protection would significantly improve the fact-finding process. We are satisfied that none was required in this case.

Id. at 56a (footnote omitted).

The court of appeals also concluded that the trial court had "correctly considered HCA's obfuscation and delay." *Id.* at 58a. The court of appeals agreed with the trial court that "HCA's delayed production was an attempt to obtain the continuance it had previously been denied." *Id.* at 58a. Moreover, "any lesser sanction would have been inadequate. Striking the untimely produced documents would only benefit HCA because those documents were damaging to HCA's liability defense." *Id.*

Jury Verdict. HCA challenged the jury verdict on the ground that the "award of $9 million in actual damages was not supported by the evidence." *Id.* at 23a-29a. The court of appeals held that HCA failed to preserve this issue for appeal because it did not challenge the sufficiency of the evidence in the trial court. *Id.* at 23a-24a.

In any event, the court of appeals "was confident that the jury's award is supported by competent evidence." *Id.* at 24a n.5. The undisputed evidence of Nathan's skull fractures and subdural hematoma were sufficient to support the jury's award of compensatory damages for his injuries. Likewise, the evidence supported the award of compensatory damages for Brandon and Brittany Shinn. The Shinns sought damages for intentional infliction of emotional distress, and the court concluded that, "[w]ithout question, the Shinns' trauma and stress of discovering that their infant child had suffered a severe head injury was only amplified by the subsequent police investigation." *Id.* at 25a-26a. Moreover, "[t]he record clearly establishes that, but for Nurse Jacob's failure to confess her role in Nathan's injuries, these investigations would not have taken place." *Id.* at 26a. As the court explained, "[t]he bulk of evidence submitted at trial spoke to an alleged coverup by HCA that extended from the moment that Nurse Jacob's actions became known all the way through trial." *Id.* at 25a.

Although HCA characterizes the amount of the verdict as "extraordinary" (Pet. i), it does not challenge the award in this Court.[5]

Jury Instruction No. 9. HCA also challenged the trial court's instruction to the jury that it "may consider the Defendant's perjury and direct disobedience of a Court order in your consideration of punitive damages for Plaintiffs." Pet. App. 12a-15a, 33a-51a. The court of appeals rejected each of HCA's state law arguments.[6]

The court of appeals upheld the jury instruction because it was true: "The substance of the instruction, i.e., that HCA disobeyed a direct court order and that it had falsely asserted that evidence had been destroyed, was predicated on verifiable fact." *Id.* at 15a. According to the court of appeals, "[t]he record is replete with evidence supportive of the Trial Court's instruction based on HCA's lack of candor." *Id.* at 13a. In addition to discussing HCA's

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[5] HCA has never challenged the amount of the punitive damages award. To the contrary, HCA conceded on appeal that there was sufficient evidence on which the jury could have based its award of punitive damages. Pet. App. 51a.

[6] HCA repeatedly insinuates that Jury Instruction No. 9 implicates its due process rights (*see, e.g.,* Pet. i, 3, 4, 8, 9, 10, 11, 21, 24, 29, 31), but HCA does not seek this Court's review of Jury Instruction No. 9. Nor would the Court have jurisdiction to consider the instruction because no federal issue was addressed by or properly presented to the court of appeals. *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam). Even if a federal issue were passed on by the state court, HCA's failure to preserve its objection to the jury instruction precludes review.

violation of a court order, the court discussed "two specific incidents of gross misconduct to illustrate the tenor of HCA's egregious and questionable behavior throughout litigation." *Id.* Indeed, HCA conceded on appeal that it had violated the Oklahoma Discovery Code. *Id.* at 37a.

The court of appeals also held that HCA failed to preserve its objection to the instruction. *Id.* at 35a-36a. HCA did not offer an alternative to Jury Instruction No. 9, and its "objection at the instruction conference [was] so vague that it failed to give the district court the opportunity to correct any error about which HCA now complains." *Id.* at 35a.

5. The Oklahoma Supreme Court denied HCA's request for review. A dissenting justice expressed his disagreement with Jury Instruction No. 9 (Pet. App. 65a), but no justice expressed any disagreement with the court of appeals' decision on the issues raised in this Petition.

REASONS FOR DENYING THE PETITION

I. The Court Should Not Grant, Vacate, and Remand for Further Consideration in Light of *Caperton*.

HCA does not contend that the denial of the motion to disqualify the trial judge warrants this Court's review. Instead, HCA asks the Court to issue a "GVR" order, granting the petition, vacating the decisions of the Oklahoma Court of Civil Appeals, and remanding for reconsideration in light of this Court's decision in *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

A GVR order is not appropriate in this case. *First*, the Court lacks jurisdiction to review the recusal issue because HCA did not appeal the denial of the disqualification motion. *Second*, a GVR order is unwarranted in any event, because there is no likelihood that *Caperton* would cause the Oklahoma Court of Civil Appeals to reach a different result in this case.[7]

A. The Court Lacks Jurisdiction to Review the Recusal Issue.

This Court lacks jurisdiction to review the trial judge's decision not to recuse herself. The Court has jurisdiction to review federal questions decided "by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). If state law permits or requires an issue to be raised on appeal, failure to raise the federal question on appeal precludes this Court's review. *See, e.g.*, *Herndon v. Georgia*, 295 U.S. 441, 443 (1935).[8] Oklahoma law permits the

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[7] As of the filing of this brief in opposition, the Court has not issued any GVR orders involving *Caperton*.

[8] *See also* Eugene Gressman *et al.*, Supreme Court Practice § 3.18(b) (9th ed. 2007) (In addition to properly raising the federal question before the trial court, "[t]he question must also be pursued on appeal to higher state courts, assuming the state procedure so permits or requires."); *id.* ("Failure to follow the appellate channels provided by the state is usually fatal to the chances for Supreme Court review. The litigant will be deemed to have waived the federal issue and there will be no basis for the assertion of the Court's jurisdiction."); 16B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 4022 ("If the question was presented to lower state courts, but was not properly preserved on appeal to higher state courts, the requirement that the issue be presented to the highest state court has not been satisfied.").

denial of a motion to disqualify to be raised on appeal from a final judgment. 20 Okla. Stat. § 1403. As the Oklahoma Court of Civil Appeals noted, "HCA did not appeal the chief judge's order denying the motion to disqualify and that ruling is now final." Pet. App. 61a.

HCA contends that, despite its failure to raise the recusal issue on appeal, it preserved the issue by filing a petition for a writ of mandamus with the Oklahoma Supreme Court. Pet. 14-15. According to HCA, the Oklahoma Supreme Court decided the federal due process challenge to the trial judge's eligibility by denying the mandamus petition, and this Court has the power to review the denial of the mandamus petition because it can review all issues decided in earlier appeals. *Id.*

HCA is wrong on both counts. *First*, HCA incorrectly treats a mandamus proceeding as an interlocutory appeal. Oklahoma law makes clear that a mandamus proceeding is a *separate* proceeding, not an interlocutory appeal in the existing case. *Second*, HCA incorrectly assumes that the Oklahoma Supreme Court's denial of the mandamus petition conclusively resolved the federal question. Oklahoma law makes clear that it did not.

1. The Court has stated that, "[w]ith very rare exceptions, we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam) (internal quotation marks and citations omitted). There is no question that the

recusal issue was neither presented to nor addressed by the Oklahoma Court of Civil Appeals.

HCA attempts to avoid the consequences of its failure to appeal the recusal issue by focusing on the Oklahoma Supreme Court's denial of the mandamus petition. HCA recites the principle that, in reviewing a final judgment, this Court can review federal questions resolved in an earlier appeal in the same case. That principle does not apply here because the mandamus proceeding was an *original* proceeding in the Oklahoma Supreme Court, not an interlocutory appeal in this case. *See* Okla. Dist. Ct. R. 15(c) ("An original proceeding in mandamus to disqualify a judge in a civil action or proceeding shall be brought in the Supreme Court."). The Oklahoma Supreme Court's order expressly stated that it was exercising its original jurisdiction. Pet. App. 68a ("Original jurisdiction is assumed.").[9] HCA offers no authority for treating a mandamus proceeding as an interlocutory appeal. Nor does HCA cite any case in which this Court has exercised jurisdiction over a final judgment in which the federal issue in question was not raised on appeal on the ground that the issue was raised in a mandamus proceeding.

2. The Oklahoma Supreme Court did not conclusively decide a federal question because the denial of HCA's mandamus petition was not a

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[9] That the mandamus proceeding was a distinct proceeding, and not an appeal in this case, is also apparent from the caption of the mandamus proceeding, *HCA Health Services of Oklahoma, Inc. v. Swinton*, which states that the trial judge was the respondent in the mandamus proceeding. Pet. App. 68a.

decision on the merits of the claim. The opinion of the Oklahoma Supreme Court states, in its entirety: "Original jurisdiction is assumed. Writ of mandamus denied." Pet. App. 68a (citations omitted). The Oklahoma Supreme Court has held that a summary denial of a mandamus petition is not a decision on the merits of the claim:

> The merits of granting or denying mandamus are often different than those of the underlying claims, and we will not presume that we have adjudicated the underlying merit issues, even if we have exercised our discretionary power to review the petition itself by assuming jurisdiction. . . . We will not assume, from an order silent on rationale, that our denial of relief was on the merits of the underlying claim. Our summary denial of mandamus relief, without an opinion, should not be given preclusive effect.

Miller Dollarhide, P.C. v. Tal, 174 P.3d 559, 566 (Okla. 2006).

In sum, HCA was entitled to raise the recusal issue on appeal from the final judgment. Its failure to do so precludes this Court's review.

B. *Caperton* Is Unlikely to Affect the Recusal Decision in This Case.

Even if this Court had jurisdiction to consider the recusal issue in this case, a GVR order would not be warranted. As HCA acknowledges (Pet. 12), a GVR order is appropriate only if there is "a reasonable

probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). For at least three reasons, it is not reasonably probable that the Oklahoma Court of Civil Appeals would hold that recusal was required in light of *Caperton*. *First*, that court is unlikely to consider the issue at all, because it was not appealed and therefore is final. *Second*, the Oklahoma courts applied a recusal standard that is very similar to – and arguably more demanding than – the standard applied in *Caperton*. *Third*, the facts of this case are quite different from the facts of *Caperton*, and *Caperton* does not suggest that this is the type of rare and extraordinary case in which recusal is constitutionally required.

1. Even if this Court were to issue a GVR order, the Oklahoma Court of Civil Appeals would be unlikely to reconsider the recusal decision because that decision is final. HCA was permitted by Oklahoma law to challenge the recusal decision on appeal, but it chose not to do so. In its opinion on rehearing, the court of appeals stated that the recusal decision was "final." Pet. App. 61a.

HCA asks this Court to vacate the Court of Civil Appeals' decisions and to remand the case to that court for reconsideration of the recusal issue. In so doing, HCA seeks to vacate decisions issued in appeals in which the recusal issue was neither raised nor decided, and to remand the case for "reconsideration" by a court that never considered the issue in the first place. HCA offers no reason to think that the court of appeals will consider the

recusal issue for the first time on remand. To the contrary, HCA admits (with some understatement) that its failure to appeal the recusal decision may affect the court of appeals' "ability to revisit the propriety of Judge Swinton's refusal to recuse." Pet. 15 n.4.[10]

2. A GVR order is also unwarranted because the recusal standard applied in this case is quite similar to – and arguably more demanding than – the standard applied by this Court in *Caperton*. In *Caperton*, the Court held that due process "require[s] recusal when the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." 129 S. Ct. at 2257 (internal quotation marks and citation omitted). As the Court explained, "[t]he inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Id.* at 2262 (internal quotation marks and citation omitted).

Oklahoma courts apply a similar, if not more rigorous, standard in determining whether recusal is necessary. In *Pierce v. Pierce*, 39 P.3d 791 (Okla. 2002), the Oklahoma Supreme Court held that recusal is required when a judge's "impartiality

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[10] To the extent that HCA seeks reconsideration of the mandamus denial, it provides no reason to expect that the state intermediate appellate court would review a decision of the state supreme court in a proceeding under the supreme court's original jurisdiction.

might reasonably be questioned," and that "[t]he question of a judge's appearance of impartiality is determined by an objective standard." *Id.* at 797. Under this standard, recusal was required in *Pierce*—even though there was no evidence of any actual bias—because the lawyer and his father contributed to the judge's campaign the maximum amount allowed under Oklahoma law, and because the lawyer was soliciting funds for the judge during the pending case. *Id.* at 798. Moreover, the court specifically noted that there was no showing that the contributions and solicitations were a minimal part of the judge's campaign. *Id.* As this decision illustrates, *Pierce*'s "impartiality might reasonably be questioned" standard is arguably more rigorous than *Caperton*'s "potential for bias" standard.

In denying HCA's motion to disqualify, Judge Swinton and Chief Judge Elliott both applied the *Pierce* standard. Because these courts applied a standard at least as strict as the *Caperton* standard, the state courts are unlikely to reconsider their previous decisions in light of *Caperton*. A GVR order is therefore unwarranted. *See Lawrence*, 516 U.S. at 167.

3. A GVR order is also unwarranted because *Caperton* does not call into question the state courts' denial of HCA's motion to disqualify. *Caperton* requires a judge to recuse herself "when the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." 129 S. Ct. at 2257 (internal quotation marks and citation omitted). The Court concluded that this standard was satisfied "when a person with a personal stake in a particular case had a

significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Id.* at 2263-64.[11]

In the "extraordinary situation" presented in *Caperton* (*id.* at 2265), the Court concluded that Don Blankenship "had a significant and disproportionate influence in placing Justice Benjamin on the case." *Id.* at 2264. The Court explained:

> Blankenship contributed some $3 million to unseat the incumbent and replace him with Benjamin. His contributions eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin's campaign committee. Caperton claims Blankenship spent $1 million more than the total amount spent by the campaign committees of both candidates combined.

Id. (citation omitted). Although recusal was constitutionally required on these facts, the Court expressly noted that "[a]pplication of the

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[11] HCA incorrectly states that "*Caperton* requires a judge to disqualify herself from a case in which her campaign manager represents a party." Pet. 12. As the Court's opinion makes clear, "raising funds or directing the judge's election campaign" requires recusal only when these actions have "a significant and disproportionate influence in placing the judge on the case." *Caperton*, 129 S. Ct. at 2263-64.

constitutional standard implicated in this case will . . . be confined to rare instances." *Id.* at 2267.

This case does not come close to presenting the sort of "extraordinary situation" that required disqualification in *Caperton*. Here, Judge Swinton was *unopposed* for reelection. Resp. App. 5a. As a result, she was *deemed* reelected – and therefore her campaign ended – over three months before HCA filed its motion to disqualify. *Id.*[12] To the extent that she campaigned before it was clear that her reelection would be unopposed, her husband – and not the campaign's formal co-chairs – organized her campaign. *Id.* Judge Swinton knew who contributed to her campaign, but she did not know how much. *Id.* at 4a-5a. Had she known the contribution amounts, she would have learned that the Shinns' counsel, Mr. Durbin, made a net contribution of only $280.30, or less than 4 percent of her campaign total (which was itself a modest amount). *See* p. 6 *supra*.

On the facts of this case, there is very little chance that the Oklahoma courts would determine that the Shinns' counsel "had a significant and disproportionate influence in placing the judge on the case." *Caperton*, 129 S. Ct. at 2263-64. Indeed, by virtue of the fact that Judge Swinton's reelection was unopposed, it is unlikely that *any* contributor could have had a "significant and disproportionate influence" on the outcome of the election. Accordingly, even if this Court had jurisdiction over

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[12] Under Oklahoma law, an unopposed candidate does not appear on the ballot, but is instead "deemed to have been nominated or elected." 26 Okla. Stat. § 6-102.

the issue, there would be no basis for issuing a GVR order in light of *Caperton*.

II. The Due Process Challenge to the Sanctions Hearing Does Not Warrant This Court's Review.

HCA does not contend that the entry of a default judgment as a sanction for litigation misconduct violates the Due Process Clause. *See Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909) (no due process violation for entry of default judgment as sanction for discovery violation). Nor does HCA question in this Court the state courts' determination that the liability issues were undisputed, leaving only the damages issues for trial. Pet. App. 12a. HCA nevertheless asks the Court to grant review of the process by which the trial court entered a default judgment on liability. Pet. 16-29. HCA contends that its due process rights were violated because it was not provided "particularized" notice and was not allowed to file a written response to the sanctions motion or to have an evidentiary hearing. *Id.* HCA asserts that courts are "deeply divided" on these issues, but that is not so.

HCA's argument disregards the fundamental principle that "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Because of this flexibility, due process may require a particular protection – for example, an evidentiary hearing – in some situations but not in others. As a result, courts can and do reach different conclusions on whether a particular protection is required without creating a split of

authority. The different outcomes merely reflect "a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." *Id.*

Rather than focusing on the particular situation at issue in this case – sanctions for violating the trial court's discovery order – HCA cites sanctions cases arising in a variety of contexts without drawing any distinctions based on the type of sanction being considered, the authority for the sanction, or the reason for the sanction.

HCA thus ignores the substantial differences between imposing sanctions for discovery order violations and imposing sanctions in other contexts. In discovery order cases such as this one, the party has failed to comply with its discovery obligations, and the court has informed the party of its violations and ordered it to comply. Only if the party *continues* its noncompliance – in direct violation of the court's orders as well as the preexisting discovery obligations – will the party be sanctioned for violating a discovery order. By contrast, in other situations the party being sanctioned has not received a prior order informing it of its violations and compelling it to act, and therefore additional protections may be necessary before sanctions are imposed.

Because the sanctions hearing in this case neither implicated a split of authority nor violated due process, no further review is warranted.[13]

A. The Sanctions Hearing Implicated No Split of Authority.

1. HCA incorrectly alleges a split of authority on whether due process requires "particularized" notice before imposing sanctions. Pet. 18-21. HCA asserts that no fewer than five federal courts of appeals and four state supreme courts require "particularized" notice (*id.* at 18), but it cites only one case, *Ohio Furniture Co. v. Mindala*, 488 N.E.2d 881 (Ohio 1986) (per curiam), involving sanctions for a discovery order violation. In *Mindala*, the Ohio court considered the type of notice required under a state *statute* (*id.* at 883); the court did not interpret the federal Due Process Clause. Accordingly, this decision does not create a split of authority on a federal question.[14]

There is no split of authority on whether due process requires "particularized" notice before imposing sanctions for discovery order violations. To the contrary, courts of appeals that, according to

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[13] Review by this Court is not warranted for the additional reason that the court of appeals' opinions are unpublished. As a matter of Oklahoma law, unpublished decisions have no precedential value and cannot be cited in any brief or relied on by any court. 20 Okla. Stat. § 30.5; Okla. S. Ct. R. 1.200(b)(5).

[14] The other cases cited by HCA in support of a "particularized" notice requirement considered sanctions imposed in a variety of contexts, including perjury, improper filings in bankruptcy, and violations of Federal Rule of Civil Procedure 11.

HCA, require "particularized" notice have expressly refused to require such notice for discovery order violations. *Compare* Pet. 18 (citing *Mackler Prods., Inc. v. Cohen*, 225 F.3d 136 (2d Cir. 2000)), *with Daval Steel Prods. v. M/V Fakredine*, 951 F.2d 1357, 1366 (2d Cir. 1991) ("Parties and counsel have no absolute entitlement to be 'warned' that they disobey court orders at their peril."); *compare* Pet. 18 (citing *In re Deville*, 361 F.3d 539 (9th Cir. 2004)), *with Malone v. U.S. Postal Service*, 833 F.2d 128, 133 (9th Cir. 1987) ("[W]e find a warning to be unnecessary here. A plaintiff can hardly be surprised by a harsh sanction in response to willful violation of a pretrial order.").[15]

HCA's mischaracterization of the law with respect to "particularized" notice is especially apparent in its treatment of Tenth Circuit law. The trial court sanctioned HCA under 12 Okla. Stat. § 3237(B)(2). In affirming the trial court's application of this provision, the court of appeals cited Tenth Circuit decisions. Pet. App. 8a (citing *Jones v. Thompson*, 996 F.2d 261, 264 (10th Cir. 1993); *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920-21

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[15] Other circuits that have addressed the issue have reached similar conclusions. *See, e.g.*, *FDIC v. Conner*, 20 F.3d 1376, 1383 (5th Cir. 1994); *Stuart I. Levin & Assocs. P.A. v. Rogers*, 156 F.3d 1135, 1142 (11th Cir. 1998); *Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409, 1422 (Fed. Cir. 1997); *Martin v. Brown*, 63 F.3d 1252, 1263 (3d Cir. 1995); *FDIC v. Daily*, 973 F.2d 1525, 1532 (10th Cir. 1992); *Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1073 (6th Cir. 1990); *Tamari v. Bache & Co.*, 729 F.2d 469, 472-73 (7th Cir. 1984); *Schleper v. Ford Motor Co., Auto. Div.*, 585 F.2d 1367, 1379 (8th Cir. 1978).

(10th Cir. 1992)).[16] The Tenth Circuit has clearly held that "particularized" notice is not required before imposing sanctions for a discovery violation. *See, e.g., FDIC v. Daily*, 973 F.2d 1525, 1532 (10th Cir. 1992) (district court has no "obligation to warn a party specifically that a default judgment is a possible sanction before entering a default judgment. The district court's failure to warn Daily of the possibility of sanctions is of no consequence."). HCA nevertheless treats the Tenth Circuit as a "particularized" notice jurisdiction based on a case in which the court of appeals held that *it* would not impose sanctions on appellants for bringing a frivolous appeal without "giv[ing] Appellants notice that we are contemplating imposing sanctions and an opportunity to respond." *United States ex rel. Jimenez v. Health Net, Inc.*, 400 F.3d 853, 857 (10th Cir. 2005).

2. Similarly, there is no split of authority on the scope of a party's due process right to be heard before sanctions are imposed for discovery order violations. Contrary to HCA's assertion (Pet. 22), federal courts of appeals have not held that due process requires an opportunity to respond in writing before sanctions are imposed. The cases on which HCA relies hold only that an opportunity to file a written response is *sufficient* to satisfy due process; they do not suggest –

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[16] Because section 3237(B)(2) is patterned after Federal Rule of Civil Procedure 37, the Oklahoma Supreme Court has looked to Tenth Circuit decisions interpreting Rule 37 for guidance in interpreting section 3237. *See Barnett v. Simmons*, 197 P.3d 12, 18 (Okla. 2008); *Payne v. Dewitt*, 995 P.2d 1088, 1093 n.6 (Okla. 1999).

as HCA contends – that a written response is *necessary* to satisfy due process. *See, e.g., Pac. Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir. 2000) ("The opportunity to brief the issue fully satisfies due process requirements."). These and other due process cases consider the opportunity to file a written response to be an effective *substitute* for a live hearing before a judge. They do not hold that a party is entitled to *both* a live hearing – which HCA received in this case – *and* an opportunity to file a written response.

Equally baseless is HCA's assertion that some courts have held that due process requires an evidentiary hearing before sanctions can be imposed for discovery order violations. HCA cites only one case, *Doulamis v. Alpine Lake Property Owners Association, Inc.*, 399 S.E.2d 689 (W. Va. 1990) in which an evidentiary hearing was ordered for a discovery order violation. And in that case, the West Virginia Supreme Court merely held that an evidentiary hearing was required before sanctions could be imposed under a state rule of procedure. *Id.* at 693. *Doulamis* did not hold that failure to provide an evidentiary hearing would violate the federal Due Process Clause.[17]

Contrary to HCA's assertion (Pet. 23-24), the Oklahoma courts have not taken a less restrictive

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[17] Moreover, the West Virginia Supreme Court has applied its decision in *Doulamis* to hold that the requirement of an evidentiary hearing is satisfied by a hearing during which the trial court considered the motion for sanctions and the reasons for noncompliance. *See Cox v. West Virginia*, 460 S.E.2d 25, 32 (W.Va. 1995). HCA received precisely this sort of hearing.

approach than other courts. The assertion (Pet. 23) that the trial court sanctioned HCA based "solely on the representations made by respondents in their motion and at the hearing" is incorrect. HCA was given a two-hour hearing during which it had every opportunity to explain why responsive documents were not produced until October 27 when the court ordered them to be produced within a week of August 25. Pet. App. 57a-58a. HCA "argued that the delay in production was justified" because it was unsure of its discovery obligations until October 24 when the court denied its motion to strike. *Id.* at 46a. The court of appeals concluded that the August 25 order was "sufficiently clear" and that HCA's argument to the contrary was "disingenuous." *Id.* Further review of those fact-bound issues is not warranted.[18]

B. The Sanctions Hearing Fully Complied With Due Process.

No due process violation occurred this case. HCA received clear notice – in the form of the trial court's August 25 order – of its failure to comply with its discovery obligations. HCA knew that if it failed to comply with the court's order Oklahoma law authorized the court to enter a default judgment. Pet. App. 11a. Prior to the hearing, the Shinns filed a motion for sanctions, informing HCA that they

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[18] HCA now asserts that its delay in producing documents was "a function of the recusal process and the accompanying stay." Pet. 8. Considering that the motion to disqualify was not filed until *September 21* – several weeks *after* the court's deadline for producing documents – this excuse is just as "disingenuous" as the reason given in the court of appeals.

were seeking a default judgment as a sanction for violation of the August 25 order. During the two-hour hearing on the motion, the Shinns reiterated their request for a default judgment sanction and detailed HCA's failure to comply with the court's order. Yet HCA contends that this notice was not sufficient because the trial court did not state that it was considering granting the Shinns' motion.

No court has held that due process requires the type of notice to that HCA argues it was entitled to receive. Even the "particularized" notice cases on which HCA (incorrectly) relies do not require such notice. *See, e.g., Mackler*, 225 F.3d at 144 ("particularized" notice requirement satisfied where party received a motion discussing the basis for sanctions and was present at a court hearing on the subject). Most importantly, the cases involving sanctions for discovery order violations do not require more notice than was given here. *See, e.g., Conner*, 20 F.3d at 1383 ("Like all court orders, discovery orders are to be obeyed when issued, and sanctions for violating such orders may be imposed without an explicit prior warning or a litany of precautionary instructions."); *Tamari*, 729 F.2d at 472 ("In general, where a party has received adequate notice that certain discovery proceedings are to occur by a specific date, and that party fails to comply, a court may impose sanctions without a formal motion to compel the discovery from the opposing party.").

Nor were HCA's due process rights violated because it was not allowed to file a written response or given an evidentiary hearing. The record does not support HCA's assertion that it was denied an

evidentiary hearing. The transcript of the hearing demonstrates that HCA never requested to present evidence, much less that it made a request to introduce evidence that was denied by the trial court. Pet. App. 70a-105a. Moreover, as discussed above (*see* pp. 25-28 *supra*), HCA cites no case holding that due process requires either of these protections before a party can be sanctioned for violation a discovery order.

The absence of a due process violation is especially apparent because, after the conclusion of the sanctions hearing, HCA was "permitted to submitted a written response and exhibits." Pet. App. 58a. The Oklahoma courts reviewed the submissions and concluded that "HCA has not, in any of its post-trial or appellate submissions, either offered a defense to the factual basis for the Shinns' motion, which was not originally presented to the district court or shown that the district court erred in finding that HCA failed to comply with the August 25 order." *Id.* Indeed, HCA conceded that it violated its discovery obligations in this case. *Id.* at 37a. Because the opportunity to make a written submission and submit evidence would not have changed the outcome of this case, HCA's due process argument lacks merit.

The Oklahoma Court of Civil Appeals concluded that the sanctions hearing complied with due process by applying this Court's decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See* pp. 9-10 *supra*. There is no reason for this Court to reconsider the application of *Mathews* to the particular facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Gerald E. Durbin, II
Katherine T. Loy
Counsel of Record
Glen Mullins
DURBIN, LARIMORE & BIALICK
920 North Harvey
Oklahoma City, OK
(405) 235-9584

October 2009

Counsel for Respondents

APPENDIX

September 21, 2006

IN THE DISTRICT COURT
OF OKLAHOMA COUNTY
THE STATE OF OKLAHOMA

Case No. CJ-2005-5368

NATHAN SHINN, by and through his parents, BRITTANY SHINN and BRANDON SHINN, and BRITTANY SHINN and BRANDON SHINN, individually,
Plaintiffs,

v.

HCA HEALTH SERVICES OF OKLAHOMA, INC., d/b/a OU MEDICAL CENTER d/b/a CHILDREN'S HOSPITAL; OU MEDICAL CENTER,
Defendants.

TRANSCRIPT OF PROCEEDINGS OF MOTION TO RECUSE

APPEARANCES

MR. GERALD E. DURBIN, II, MS. SARAH LEE PARRISH AND MR. GLEN MULLINS, Attorneys at Law, appearing on behalf of the plaintiffs.

MR. BRENT L. THOMPSON and MR. DENNIS C. ROBERTS, Attorneys at Law, appearing on behalf of the defendants.

PROCEEDINGS

(The following proceedings were had in open court on September 21, 2006, with Court and counsel present:)

THE COURT: We're on the record on Shinn versus HCA, CJ-2005-5368 for the pretrial. And one party has asked for a court reporter, so whoever asked for that, go ahead and tell me why.

MR. THOMPSON: That would be me, Judge. And the reason I've asked for a court reporter is because of the motion that I've been placed in a position that I hope to never make, but I have to make, and that is a motion pursuant to, even though we're in the courtroom, nobody else is here, Rule 15 – District Court Rule 15A, which requires me to make an in-camera request for you to disqualify from the case before I file a motion requesting you to do so.

THE COURT: What's the basis?

MR. THOMPSON: The basis is a couple of fold. This case was filed in July 2005. You were assigned, I think, from the inception of the case.

THE COURT: Uh-huh.

MR. THOMPSON: And the – according to the judicial – according to the Ethics Commission filings Mr. Durbin became your – the chairman of your campaign – re-election campaign committee for 2006 in March of 2006. That was not disclosed to us at all at any point.

The other basis, and I'll get to the legal parts of it next, but the other factual basis is that based on filings with the State Ethics Commission between Mr. Durbin and other members of his firm they've

contributed almost a third of the total contributions that have been reported to the Ethics Commission for your 2006 re-election campaign.

And the motion comes on based on a couple of legal principles. One is Canon 3 – Canon 3, Section E of the Oklahoma Code of Judicial Conduct and it states:

> "A judge should disqualify himself/herself in a proceeding in which the judge's impartiality might be reasonably questioned."

And the Oklahoma Supreme Court has further defined that standard in the case of *Sadberry versus Wilson*, 1968 OK 61. And it states:

> "Where there are circumstances of such a nature as to the cause" – "as to cause doubts as to the judge's partiality, bias or prejudice, it is a judge's duty to disqualify, even if the judge believes they can be impartial."

And the standard is an appearance of impropriety. It's not from an objective person's perspective, not from yours, not from mine, not from Mr. Durbin's. And so it's on that basis and then there are Supreme Court cases that *Pierce versus Pierce*, Oklahoma Supreme Court 2001 OK 87, required disqualification where there was a significant campaign contribution by an attorney appearing before a judge and they assisted the judge's campaign by soliciting funds.

The case of *Larecy*, L-A-R-E-C-Y *versus Sullivan*, 1952 OK 290. Again, an Oklahoma Supreme Court case. Disqualification was required when a lawyer

was involved in the judges previous campaign, actively campaigned and distributed campaign literature.

At least from our perspective, Judge, we have a situation that's a degree of involvement that's much greater than even those Supreme Court cases suggest and that's why we're asking for you to disqualify in the case, send us to the Chief Judge and have us re-assigned.

THE COURT: Okay. I have had this issue come up this year with John Norman, and do you know Bill Leach?

MR. THOMPSON: I do not.

THE COURT: From Tulsa.

MR. THOMPSON: I do not.

THE COURT: Okay. All right. I was hoping that would help. Okay. Here's a copy of the order dealing with that issue. And I assume because you all are from Tulsa and not from here that you're not familiar with my campaign past.

In 2002, when I first ran for D.J., I had a person that was not a candidate in the race spend $150,000 on T.V. time the last week of the race and so we had a lot of last minute fundraising. And apparently because the way my campaigns are set up I don't ever know how much anyone gives me. All I know is who the contributor lists are so that I can do thank you notes. But I never see the amounts, only my treasurer sees the amounts. And because the ethics rules have changed and the judge is no longer required to sign off on the contributors reports, I don't ever know what the amounts are.

So the case that I've handed you was the case where John Norman was apparently one of the largest donors of my campaign last time in 2002 and someone made a comment during a deposition in Tulsa about, well, we're not going to get anywhere in this case because we didn't give as much money to her campaign as John Norman did, and that's what brought forth the Motion to Recuse. And it was taken up and Judge Dixon was the Chief that month – here's a copy for you guys, sorry – and it was discussed. They did an affidavit from my treasurer at the time, Laura McConnell, to explain I didn't know who the contributors were. Mr. Durbin and Mr. Derryberry were my co-chairmen last time in 2002 and they were the co-chairmen this time in 2006. And because you don't know me well, you don't also know that my husband is a lobbyist and runs campaigns as a hobby and so he is the real operation behind my two campaigns that I have had.

And as you probably know I didn't get an opponent an this time, so there is no ongoing campaign and no ongoing need for Mr. Durbin or Mr. Derryberry to continue in that activity.

So I assume you knew none of that and I thought it would be fair to give you that information and tell you that I'm sure Mr. Durbin would agree that he has not always agreed with my rulings on some of his firm's cases and, in fact, had to take one of his associates to task for their writing style in front of summer interns, which I really hated to do, but I had to do it because that was the appropriate thing to do.

So I understand your concerns, your clients' concerns and where that would come from, but because you may not have had all that historical

benefit of that analysis I will decline the Motion to Recuse. And you can take it up to the Chief, if you wish, or if you want time to look at that order and talk to your client and decide what you want to do, that's fine.

My concern is I don't want to continue the trial in case the Chief denies your motion and we lose the trial date, which is what we spent most of the time talking about in the discovery conference that we had whenever that was, a few weeks ago. So let's see. I can't remember how many days the Chief has to review it. Do you remember?

MR. THOMPSON: No, I don't, Judge.

MS. PARRISH: I have the Rule right here. Let's see.

MR. THOMPSON: Just briefly just for the record purposes and for no other purpose.

THE COURT: Uh-huh.

MR. THOMPSON: Thank you for the explanation, first of all. I appreciate that. But the contribution issue is not the only issue we have. I'm assuming, I haven't looked at the opinion you've handed me, but it does not appear that Mr. Durbin was a lawyer in this case that you've handed me the opinion of, it's John Norman –

THE COURT: No. That issue solely dealt with John Norman.

MR. THOMPSON: Right.

THE COURT: Yeah.

MR. THOMPSON: John Norman. And I'm not aware by any of the Oklahoma Ethics Commission

filings that Mr. Norman has ever served as your chair of your campaign or re-election campaign and so I still have that issue that is separate and apart and different from what was addressed by this *Meeks* opinion by whomever the Chief was at that time.

THE COURT: Judge Dixon.

MR. THOMPSON: Just for the record purposes.

MR. DURBIN: Let me say for the record that if you took this to Judge Dixon, I also was chair of his campaign. If you took this to Judge Ricks, I am on her campaign. If you took this to Judge Gurich, I have been on her campaign re-election committee. There aren't too many judges that I consider to be competent and qualified and ethical that I have not worked for their re-election because justice is best administered by quality judges. And to say that the cost that I and my clients must pay to support quality persons for the bench is the fact we can't try our cases before those judges is a little bit ironic.

I will state for the record, too, that I have never been involved in a meeting that's been private of nature with the Judge. About every committee meeting we've had that I've been at there's been 40 lawyers there. Jerry Green, Pierce Couch; Hugh Baysinger, Pierce Couch. I'm trying to think off the top of my head who are the other defense firms that do medical malpractice defense that have been on the committee.

And whatever has been done effectively in terms of working for her re-election has been done by me with them in a breakfast meeting, two specifically, and there must have been 40 different lawyers there. I've never met with her privately or personally about

her campaign in any of them. And, quite frankly, it's more of a – I think it's more of a figure-head position than it is a substantive position because I'm not much of a politician.

MR. THOMPSON: Well, and the other issue we have, and I'm glad you mentioned that, Mr. Durbin, is that certainly at least our reading of the Canons of Judicial Conduct and the Supreme Court opinions and the Oklahoma Judicial Ethics opinions are that at the very minimum either the level – the level of contribution, whether you knew it on a daily basis or not, and the fact that Mr. –

THE COURT: No, I would never know it.

MR. THOMPSON: Right.

THE COURT: That is my point.

MR. THOMPSON: Well, the fact that Mr. Durbin was the chair of your committee, at least according to public filings as of March of this year, the opinions of the Supreme Court, the Ethics Commission and the Judicial Canons, would require you to at the very least disclose that on the record and that has not been done either.

THE COURT: I think what those cases say that if an attorney has represented you, you have a requirement to disclose that to opposing counsel. I haven't – don't recall any opinions that say if they hold a position on your campaign committee that you're required to disclose that.

MR. DURBIN: I've never heard that.

MR. THOMPSON: Judicial Ethics Opinion 5 – 2001 OK Judicial Ethics 5 states:

> "It is the duty of the presiding judge to disclose on the record any information which the judge believes the parties or attorneys might consider relevant to the question of disqualification, even if the judge believes that there is no real basis for disqualification."

And it's certainly our contention the fact that Mr. Durbin holds the highest position on your re-election campaign committee presently while this case is pending in the year 2006, that that Judicial Ethics opinion would require at least the disclosure of that to me and my clients so it can be addressed.

MR. DURBIN: Excuse me. I'm sorry. Let me just say now, I'll let Sarah Lee take about the law, but I think the problem is 100 miles between Tulsa and Oklahoma City. Because every lawyer, virtually every lawyer in Oklahoma City of any stature or prominence will know who's on the judge's re-election committee because they're there. And the reason you have Tulsa law firms filing these motions is they aren't aware. They aren't sitting there at these and it would be just the opposite probably in Tulsa between Oklahoma City. It's not like Tulsa lawyers are bad lawyers. You have Bill Leach, Tulsa lawyer. You have this firm, Tulsa law firm, but this case could have very well been defended by the Pierce Couch firm. It could have been defended by Robert Margo's firm back when he was doing it and Robert Margo was on your re-election committee, so they would know that.

So I think in fairness they don't know and I don't know of any obligation myself to say anything, but you've got a comment on the law there.

MS. PARRISH: Yeah, I do. A Judicial Ethics opinion in '99 didn't even require a judge to recuse when one of the attorneys appearing before the judge in a contested action previously had represented the judge some years prior to that. They talked about the lawsuit was settled without a trial and the judge had no further attorney-client relationship with the lawyer for over three years. So, you know, that's an even closer type of situation than what we have here. That's Judicial Ethics Opinion Number 1999-3. It's a –

MR. THOMPSON: Very briefly. And Mr. Durbin brought up an outstanding point. I live in Tulsa. I practice – I can't say that I practice primarily in Tulsa, Judge. I'm here a lot. My firm is here a lot. But he brings up an outstanding point. Tulsa lawyers don't have inherent in them the knowledge of things that go on in Oklahoma County, which is exactly why this Judicial Ethics Opinion requires disclosure on the record. That's a perfect point. And that's a perfect example of why that opinion pinned in 2001 is important.

THE COURT: Okay. Well –

MR. THOMPSON: But I understand your ruling.

THE COURT: Okay. All right. More of my concern is how fast can you get it up –

MR. THOMPSON: Next week.

THE COURT: – to the Chief so that we don't lose our trial date.

MR. THOMPSON: Well, my reading of the rules is I need to file a written motion for you to consider.

THE COURT: Well, I assume you brought that.

MR. THOMPSON: Well, I brought it, but since you have given me this –

THE COURT: Uh-huh.

MR. THOMPSON: – I would like the opportunity, if I could have it, until Monday to file it to see if I need to incorporate this in there. I think to be fair I need to incorporate it in.

THE COURT: Okay. I was hoping we would get the motion on file today while you were here.

MR. DURBIN: Why don't you – Why don't you file the motion and just take judicial notice that the motion's amended to the extent –

THE COURT: Because the Chief is going to consider it, not me.

MR. THOMPSON: I want the – I want the Chief to be fair, I mean, it does come to you technically first, I think.

THE COURT: Correct. But because we've done the in-camera in the courtroom without other people on the record –

MR. THOMPSON: Right.

THE COURT: – there's really no point in making you have another hearing –

MR. THOMPSON: Okay.

THE COURT: – once you've filed your motion.

MR. THOMPSON: Okay.

THE COURT: So I will deem your motion filed, if you'll go ahead and get it on file.

MR. THOMPSON: Okay.

THE COURT: And then waive any requirement of having an additional hearing –

MR. THOMPSON: Okay.

THE COURT: – and let you go ahead and take it to the Chief and explain to him why –

MR. DURBIN: Who is the Chief?

THE COURT: This month is Judge Elliott. So we're still meeting so he's not available right this second, but his staff probably can tell you when he can set it even though he's not there.

MR. THOMPSON: Okay.

THE COURT: All right. Thank you very much.

MR. THOMPSON: Thanks, Judge.

THE COURT: So –

MR. DURBIN: Pretrial.

THE COURT: Yeah. Do you all want to continue that and have –

MR. DURBIN: No. Let's hold the pretrial.

THE COURT: What I'm saying is what we can do is as soon as you get a ruling from Judge Elliott, if it's no, then you guys call my office and figure out how to get over here pretty fast.

MR. DURBIN: We have to have a pretrial anyway.

THE COURT: I know you do. I'm just saying timing wise.

MR. THOMPSON: Right. And my concern would be, Judge, I didn't get to this, but I would request that the court stay any further rulings until Judge Elliott has a chance to rule on this and that would include rulings in the pretrial. Because if he says "yes", then we're back at another judge and I'm asking them to reconsider things potentially that are just a waste.

THE COURT: Okay. That's fine. I don't mind striking – the motions are set tomorrow; is that right?

MR. THOMPSON: Right.

MR. DURBIN: Pretrial is today.

THE COURT: Right. But what I'm saying is once you get your ruling from Judge Elliott, then explain to him that you have a trial setting –

MR. THOMPSON: Uh-huh.

THE COURT: – on the – is it the 20th?

MR. THOMPSON: It's on the 30th of August – October.

THE COURT: Okay.

MR. THOMPSON: And I'll make sure that we put that in the motion, too.

THE COURT: Yeah. Explain to them, his staff, that it needs to be set quickly. Next week is a jury week, so I don't know whether or not he will set chief matters on jury weeks, I just don't know.

MR. THOMPSON: Okay.

THE COURT: So you'll have to check with that. But explain to them the necessity to get this going and then as soon as we have a review from Judge

Elliott and his decision, then you guys call my office and we'll figure out how to reset them as expeditiously as possible.

MR. THOMPSON: Right.

THE COURT: And if we need to have the pretrial and summary judgments on the same day, I don't mind doing that.

MR. THOMPSON: Okay.

THE COURT: It's just we need to –

MR. DURBIN: I would like to note for the record that your ruling is contrary to my request. It's what I am – it's different than what I'm asking. I'm asking the court to go ahead and hear the Pretrial Conference Order, hear the summary judgment. This judge is not going to sustain the recusal. This case is going to go on and I'd like to ask the court to go ahead and hear these things.

THE COURT: Okay. Respectfully declined.

MR. DURBIN: See what I mean, being chairman doesn't matter.

THE COURT: All right. See you guys later.

(whereupon, the hearing was adjourned.)